Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

No. 79-121

UNITED STATES OF AMERICA,
Petitioner,

vs.

BILLY GALE HENRY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Henry's Sixth Amendment right to counsel was violated when, after he was indicted and jailed for bank robbery, an F.B.I. agent caused a paid informant to gain Henry's confidence in jail to obtain admissions, the informant engaged Henry in conversations to that end and the informant testified at trial that Henry had told him of casing the bank and renting a hideout and had described the bank robbery to him.

STATEMENT OF THE CASE

The case is accurately and adequately stated in Judge Winter's opinion for the court of appeals. The government's summary of the evidence must be supplemented in the following respects. Although two armed, masked men entered the bank, so far three people have been convicted of the bank robbery on the theory they were in the bank. John Luck and Johnny Moore were convicted before Henry went to trial. The testimony against Henry, other than that challenged in the motion to vacate, was wholly circumstantial. Only one witness, John Peterson, testified to seeing the robbers unmasked.[1/] Peterson, who was 200 feet from the bank, saw the two robbers come out and get in a car. He identified Moore as one of the two robbers. He could not identify the other, taller man as Luck, nor did he say it was Henry. He said Henry was not the third man in the car and he could not say Luck was. Fingerprints were lifted near where the taller robber assaulted a teller and not identified as Henry's.[2/]

At trial, the prosecutor hinged a weak case on two informants, Edward Nichols and Joseph Sadler, both of whom claimed Henry had made admissions to them in jail. Nichols testified that Henry had told him of casing the bank and renting the hideout and had described the bank robbery.[3/] Sadler said Henry had told of a bank robbery in which Henry and "Lucky or Luck" went in the bank, another stood outside and a woman[4/] was in the getaway car.[5/]

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1 / The key part of Peterson's testimony is at tr. March 7, 1973, pp.48-53.

2 / tr. Mar. 7, 1973, p.66.

3 / tr. Mar. 7, 1973, pp.136-139. Nichols' testimony is attached as Exh. I.

4 / This was contradicted by Peterson. tr. Mar. 7, 1973, p.49.

5 / Henry's §2255 claim that Sadler's testimony was tainted, still unresolved, will be described infra.

District Judge Kellam's recital of the facts in his October, 1977 opinion is inconsistant with this description of the trial evidence (30a, 40a), but the court of appeals properly concluded that his "recollection of the evidence was inaccurate." (9a) (Butzner, C.J., concurring)

REASONS WHY THE WRIT SHOULD BE DENIED

If the court is seriously considering overruling Massiah v. United States, 377 U.S. 201 (1964), this case is as good a vehicle as any other in which to do it. In all other respects, it has no place here, and the reasons urged by the government for granting the writ do not hold up.

1. Massiah. In all significant respects, this case is the same as Massiah. The informant sought to procure admissions from Massiah not by formal questioning or trick, but by engaging him in conversation which led Massiah to make admissions. This strategem led to a tape recording, but, at Massiah's trial, testimony was permitted only about Massiah's part of the conversation, not the informant's.[6] Neither the court of appeals nor this court considered the words used by the informant to be significant; this court held federal agents could not deliberately elicit incriminating statements after indictment for use in the pending case in the absence of counsel. 377 U.S. at 206.

Although not filled out, the record in this case demonstrates this was not one in which the informant, even if so instructed, passively waited to overhear admissions by Henry to others. As concurring Judge Butzner pointed out, Nichols had " 'some conversations' with [Henry], but he did not divulge [in court] what he said to [Henry]."[7] 8a.

That the decision of the court of appeals is squarely within the rule of Massiah is conclusively demonstrated by Judge Winter's careful analysis of the post-Massiah precedents, 5a-7a, particularly Beatty v. United States, 389 U.S. 45 (1967), reversing United States v. Beatty, 377 F.2nd 181 (5th Cir. 1967). In the final analysis, the government's argument comes to the proposition, urged below[8] and renewed here,[9] that Brewer v. Williams, 430 U.S. 387 (1977) somehow narrowed Massiah. Professor Kamisar has said of that proposition, "I think [the author of both Massiah and Williams] would be startled to learn that, although when he authored the Williams opinion he evidently thought he was revivifying and expanding Massiah, he was actually restricting its scope..."[10]

2. The Court of Appeals. The choice facing the court of appeals was not reversal or affirmance, but reversal or remand. In choosing the former, it not only decided the case correctly under this court's precedents, but also displayed great common sense in view of the history of this litigation.

At trial, Nichols did not disclose that he was a jail plant, and his testimony was a "surprise" to the defense (tr. Mar. 7, 1973, p.137), because, though the prosecutor had agreed, before trial, to furnish statements of the accused, none were disclosed.

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6 / See United States v. Massiah, 307 F.2nd 62, 65 (2nd Cir. 1962).

7 / The trial record bears out Judge Butzner. Nichols testified he had "some conversations" with Henry. tr. Mar. 7, 1973, p.134. He testified he "related the product of this conversation to an F.B.I. agent," tr. Mar. 7, 1973, pp.134-135, and said Henry told him about the bank robbery, tr. Mar.7, 1973, p.135 (Did Mr. Henry tell you anything about that bank robbery? Yes sir.) and that Henry gave a reason for going in the bank, tr. Mar. 7, 1973, p.136 (Did he give you any reason for going in the Janaf Bank?) It was not until after trial that Nichols' "jail plant" status surfaced, but, even without searching questioning at trial, the foregoing testimony paints him as drawing Henry out.

8 / Appellee's Brief in court of appeals, pp.6-8.

9 / Petition 10-11.

10/ Y.Kamisar, Brewer v. Williams, Massiah and Miranda: What is "interrogation"? When does it matter? 67 Georgetown L.J. 1, 42, n.283 (1978).

Two years after trial, Henry became aware of Nichols' informer status and raised the Massiah claim in his motion to vacate, together with the claim that Sadler's testimony was perjury and known to be so by the F.B.I., to whom Sadler had come in an effort to help himself. On August 28, 1975, Judge Kellam dismissed the motion without hearing. Henry's appeal to the Fourth Circuit produced a remand (53a) on March 29, 1977 instructing Judge Kellam to conduct an evidentiary inquiry(55a)or evidentiary hearing (56a) on the Nichols and Sadler points. Rather than do so, Judge Kellam wrote the prosecutor, seeking F.B.I. agent affidavits so he could "dispose of the matter without the necessity of a public hearing."[11/] Getting the affidavits, Judge Kellam again dismissed without hearing on October 11, 1977, in an opinion which, in several major respects, was factually inaccurate.[12/]

Henry's appeal from the second dismissal came before the court of appeals for argument in October, 1978, over five years after trial and still with no developed record, because the district judge did not follow the court of appeals' directions to hold an "evidentiary inquiry or hearing". Faced with this history and an adequate record under Massiah, the court of appeals would have acted cruelly and unreasonably to send Henry on the merry-go-round again, so it decided the case on the trial record and F.B.I. affidavits instead of remanding again.[13/] Affirmance of the district judge was not one of the court of appeals' choices and is not a choice here.

11/ Letter of 8/30/77, Judge Kellam to Roger T. Williams, Ass't U.S. Attorney, in record below.

12/ See 9a.

13/ Deciding for Henry on the Nichols point, it never had to reach the Sadler issue, which could not have been decided without remand and would still require hearing if the court of appeals' opinion is not sustained.

3. Wilson v. Henderson. The government makes much of the conflict with the Second Circuit decision in Wilson, 584 F.2nd 1185 (2nd Cir. 1978). As a precedent, Wilson is overstated. Decided by two visiting district judge's over the dissent of Judge Oakes and over four votes for en banc reconsideration (590 F.2nd 408) by a court notoriously wary of en banc consideration, Wilson is a poor precedent, recently demonstrated to be inconsistent with Massiah.[14/] It is unfortunate that the Wilson petition in this Court was out of time, but that is no reason to grant certiorari to the next case raising the same issue, but which is correctly decided.

4. Nichols Not The Government? For the first time, the government tries to change Nichols' status from "jail plant" to a prisoner who suddenly finds information and seeks to help himself with it. Petition, p.13. The point is new here, and inconsistent with the record. Courts have clearly and consistently held that the applicability of Massiah turns on whether, on the one hand, the informer was sent in to obtain information and, on the other, whether he first sought out the government after he got it. See United States ex rel. Baldwin v. Yeager, 428 F.2nd 182 (3rd Cir. 1970). Under Agent Coughlin's affidavit (57a), Nichols was in the former category.

14/ See Kamisar, supra n.10 at p.42, n.283.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Respondent's Brief in Opposition to Petition for a Writ of Certiorari was mailed on August 8, 1979 to:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20350

Michael E. Geltner

EDWARD BENJAMIN NICHOLS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.

A Edward Benjamin Nichols.

Q Mr. Nichols, do you know Billy Gale Henry?

A Yes; I do.

Q Do you see him here in the courtroom today?

A Yes, sir.

Q Where is he located?

A Sitting right there.

Q Okay.

MR. SIMS: Let the record reflect the witness has identified Mr. Henry.

THE COURT: The record will so show.

By Mr. Sims:

Q Where did you meet Mr. Henry?

A At the Norfolk City Jail.

Q Did you have an opportunity to have some conversations with Mr. Henry while he was in the jail?

A Yes, sir.

Q Did there come a time when you related the product of this conversation to an FBI agent?

A Yes, sir.

Q Did you relate that to the FBI agent before or after Mr. Henry gave you information?

A After.

Q Did the FBI --

What is the FBI agent's name?

A Jerry Coughlin.

Q Did he have you ask specific questions of Mr. Henry?

A No, sir.

Q Did he tell you anything about the bank robbery at the Janaf Branch of the United Virginia Bank on the 28th of August 1972?

A No, sir.

Q Did Mr. Henry tell you anything about that bank robbery?

A Yes, sir.

Q Would you relate to the jury what he told you?

A That he had been in the bank; that he had been in the bank that he was accused of; that he had been in the bank several times; that he had exchanged money several times, and he -- and one time, one particular time, that he tried --

THE REPORTER: Say it again, please.

THE WITNESS: One particular time he tried and --

THE COURT: One time he -- what?

THE WITNESS: The bank had closed, and he tried, and he was refused admission to the bank because it was closed, and he turned and walked away.

THE COURT: Speak up just a little louder, too, if you will, please, so all the jury can hear you.

By Mr. Sims:

Q Did he tell you --

MR. RABINOWITZ: If your Honor please --

I'll wait for cross-examination.

THE COURT: All right.

MR. RABINOWITZ: I think up to now --

By Mr. Sims:

Q Did he --

MR. RABINOWITZ: I'll let it go on.

By Mr. Sims:

Q Did he give you any reason for going in the Janaf Bank?

A I believe he said he wanted to see who opened the vault.

Q Okay.

Did he describe to you how a bank robbery occurred?

MR. RABINOWITZ: If your Honor please, he is leading his witness now.

MR. SIMS: Okay. I'll rephrase the question.

MR. RABINOWITZ: This is his witness, if your Honor please, --

THE COURT: Well, --

MR. RABINOWITZ: -- and from jail --

THE COURT: -- I suppose --

MR. RABINOWITZ: -- he is asking him what he said, and now he's leading him into specific --

He's trying to get something from him I don't know what it is. I've never --

The witness is a surprise to me.

THE COURT: All right. Suppose you try to rephrase it, although I don't believe that's leading, but he can rephrase the question.

Did he tell you anything about any bank robbery there?

THE WITNESS: Yes, sir.

THE COURT: All right.

What did he tell you?

By Mr. Sims:

Q What did he tell you, sir?

A He said that people were -- several people went into the bank, about showing guns, and a bank teller was hit.

Q Did he say anything about being removed from the bank?

A No. No; he didn't.

Q Did he mention anything to you about a rent receipt found --

A Yes, sir; he did.

Q Would you relate that, please?

A He said -- he told me -- that the only thing to connect him to the bank was a rent receipt of a house he had rented.

Q Have you previously been convicted of a felony?

A Yes.

MR. SIMS: That's all the questions I have.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q You are a convicted felon?

A Yes.
Q And you were in jail with Mr. Henry?
A Yes.
Q And now you're free?
A Yes.
Q Now, what Mr. Henry related to you was that he was telling you about a rent receipt and telling you about the charges against him, was he not?
A He was.
Q Isn't that it?
A He mentioned the rent receipt and he said he was in the jail for bank robbery.
Q He was telling you basically about what charges were against him, wasn't he?
A He mentioned it.
Q And that's what it was all about?
A Yes, sir.
MR. RABINOWITZ: That's all I have.
THE COURT: All right, sir.
Gentlemen, may he be excused?
MR. SIMS: No further questions.
THE COURT: Fine. Thank you very much. You are excused.
MR. SIMS: At this time, Judge, I would like to call Joseph D. Sadler.